IN THE MISSOURI SUPREME COURT

In the Interest of:	**)**	
	)	
P.L.O. and S.K.O.,	**)**	**Case No. SC85120**
	)	
Minor children.	**)**	

Appeal from the Circuit Court of Newton County, Missouri

Juvenile Division

Honorable John LePage, Judge

Appellant's Reply Brief

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References are as follows: Appellant's Brief (App. Br.) and Appellant's Appendix (App. Ap.); Legal File (LF); Transcript (TR); and Respondent's Brief (Resp. Br.). Page references in Mother's Exhibit A refer to the hand written page numbers in the upper right hand corner of the exhibit.

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JURSIDICTION OF THIS COURT

Respondent contends that this Court has no jurisdiction over this matter because appellant did not file a timely notice of appeal.

Appellant's timely notice of appeal was filed with the court of appeals on January 21, 2003. (LF 191). The appeals court should have transferred the matter to this Court sua sponte because of the constitutional issues raised, but it did not. On February 10, 2003, appellant filed her amended notice of appeal since jurisdiction for the determination of the validity of state statutes rests exclusively with this Court.

Respondent asserts that the amended notice of appeal is the equivalent of a first-time notice, and as such, it was not timely filed. The amended notice of appeal to this Court is merely a modification of the timely filed appeal. The appeal is with this Court for the purpose of determining constitutional questions, addressing issues of general interest and statewide importance, and for reexamining existing law. (Supreme Court Rule 83.02). This Court has jurisdiction to proceed.

STATEMENT OF FACTS

Appellant disagrees with the respondent's statement of facts and relies on the facts as set forth in her brief.

Respondent makes incorrect statements about the reasons the children were removed from the home, including the unstable trailer, the yard, substantiated abuse of G.O. by Father, and suspicions of sexual abuse against P.O. (Resp. Br. 19). These conditions were not alleged in the petition for temporary custody. (LF 11). Sexual abuse allegations were not substantiated. (Mother's A at 428).

Respondent's statement that the juvenile officer filed a petition for temporary custody less than 24 hours after the children were taken from appellant's home is irrelevant, as a court order is required prior to removal. (Resp. Br. 20). The order entered was ex parte and appellant was not given an opportunity to contest the allegations. (LF 1).

Respondent has no evidence for the presumption that the court terminated jurisdiction over G.O., the child who made the allegations of sexual abuse, the same day the order of custody was entered because she was already 17 years of age. (Resp. Br. 20).

Respondent relies heavily on hearsay statements made by a foster parent, summarizing statements made by a child about alleged events that

Happened anywhere from months to years before trial. (Resp. Br. 23-25). There is no credible evidence to support these assertions.

Respondent insinuates that appellant caused the children to have head lice after visitation. (Resp. Br. 27). Mother never had head lice. (TR 232, 233).

Respondent misstates the evidence that appellant missed visits more frequently as time passed. (Resp. Br. 26). The testimony is that the children missed visits more frequently, not the appellant. (TR 117).

Respondent misstates the testimony. (Resp. Br. 27). Appellant did not go to P.L.O.'s or S.K.O.'s school. (TR 235). Respondent suggests that the appellant failed to attend counseling sessions regularly, but if she missed sessions, it was because she had no transportation, no money for gas, or was working. (Resp. Br. 28, TR 52). The children were affectionate with the appellant at visitations. (TR 61). There is no evidence in the testimony referenced by the respondent that the therapist ceased visitation because of the children's alleged feelings of guilt. (Resp. Br. 28). In fact, this same therapist wrote DFS saying the children were feeling pressured to give up visits with the appellant. (Mother's A at 327, 328).

Respondent misstates the testimony. Appellant was not required to attend Alcoholics Anonymous. (Resp. Br. 32, TR 354).

Respondent does not present evidence that in May, 2002, the home was unlivable. (Resp. Br. 34).

Respondent misstates the evidence regarding notice of right to counsel in the termination of parental rights proceeding. (Resp. Br. 35). The summons referred to is notice to the appellant of the first hearing set before the court in the abuse/neglect matter, not notice of termination proceedings. (LF 41). Respondent again misstates the facts when he says that Family Services filed the original petition for termination on January 31, 2002. (Resp. Br. 35). The foster parents filed the original petition for termination on July 30, 2001. (LF 208, 212).

Respondent misstates the psychologist's testimony as to the appellant's intelligence. (Resp. Br. 36, TR 390).

Respondent misstates appellant's testimony regarding whether R.O. stayed with her. (Resp. Br. 37, TR 809).

Respondent misstates the therapist testimony regarding "splitting behavior." (Resp. Br. 41, TR 531).

Other discrepancies in the respondent's Statement of Facts are covered elsewhere in this brief.

FAILURE TO PRESERVE FOR APPELLATE REVIEW

Respondent asserts that by not raising certain issues at the trial level, appellant did not preserve those issues for review. Specifically, respondent refers to the constitutionality of RSMo 211.447.2(1), (appellant's Point 1); the constitutionality of RSMo 211.183.1, (appellant's Point 3); and issues of procedural due process violations, (appellant's Point 2). Respondent is partially correct in that those matters were not raised until appeal.

However, this Court may review on plain error matters affecting substantial rights when the Court finds that manifest injustice or miscarriage of justice has resulted from counsel's failure to preserve those issues for appeal. (Rule 84.13(c)). By way of explanation, not excuse, counsel for the appellant was appointed by the trial court in this, her first juvenile case, less than 1 year after passing her bar exam. The case had already been underway for over 2 years before this appointment, and no other attorney had been assigned to the case previously. Counsel readily admits to bewilderment and confusion. Responsibility for failure to raise these constitutional issues with the trial court falls directly upon appellant's counsel, and is the equivalent of ineffective assistance of counsel in a criminal matter.

While this is a civil matter, appellant suffers the irrevocable and permanent deprivation of a constitutionally protected fundamental right –

that of the care, custody, and control of her children. An erroneous decision by a trial court without benefit of appeal imparts consequences upon this appellant that are just as dire as in a criminal case.

This Court reviewed constitutional challenges under the plain error rule in a civil case despite the fact that they were raised for the first time on appeal in Hanch v. K.F.C. National Management Corp., 615 S.W.2d 28 (Mo. 1981). Counsel for the appellant pleads with this Court not to penalize the appellant by declining to review the issues raised in this case because of her counsel's inexperience. Fundamental rights are at stake, the constitutional questions are of statewide import, and counsel prays for plain error review.

Point 1 – Constitutionality of RSMo 211.447.2(1)

Appellant asserts that RSMo 211.447.2(1) as a ground for termination of parental rights is arbitrary, capricious, and unconstitutional. (App. Br. Point 1). Respondent suggests that the statute is constitutionally sound, and urges this Court to review on the rational basis standard. (Resp. Br. 44). Respondent relies upon Blakely v. Blakely, 83 S.W.3d 537 (Mo.banc 2002), and Troxel v. Granville, 530 U.S. 57 (1982), as support for this proposition. Neither case is relevant because both involve grandparent visitation, which is not a fundamental right. In the present case, appellant risks the loss of her fundamental right to familial relations, a liberty interest protected by the Constitution. Santosky v. Kramer, 455 U.S. 745 (1982). Strict scrutiny is the appropriate standard of review for this Court.

Respondent suggests that the 15 of 22 month time frame in RSMo 211.447.2(1) implies parental unfitness. (Resp. Br. 45). This is precisely the reason the Illinois statute was found unconstitutional in In Re H.G., 197 Ill.2d 317 (2001).

Respondent argues that Missouri has a two-step process for termination of parental rights, and that the second step – that of finding that termination is in the best interests of the child – makes the 15 of 22 month ground for termination constitutionally sound. (Resp. Br. 46). The issue

Before this Court is not whether Missouri's *process* is constitutional. This issue is whether, as a *ground* for termination, foster care for 15 of the most recent 22 months is arbitrary and capricious on its face. If so, then a court cannot reach step two, the "best interests" determination. Step two of a process cannot save a constitutionally infirm statute if step one is void ab initio.

Referring to the Adoption and Safe Families Act (ASFA), the respondent states that this federal law does not prohibit states from making extended foster care a ground for termination. (Resp. Br. 46). There is no need for Congress to directly prohibit states from doing that which is unconstitutional. However, this Court must give effect to legislative intent. Congressional intent behind the enactment of ASFA is to move children into permanent homes, and the 15 of 22 month time frame is only a prompt to initiate that process, not a stand-alone ground for termination of parental rights. (Congressional Record, App. Ap. A22-A83).

OTHER STATES' INTERPRETATIONS

The respondent relies on case law from Indiana, Nebraska, and Oklahoma as support for the constitutional validity of RSMo 211.447.2(1).

1. Indiana:

Phelps v. Sybinsky, 736 N.E.2d 809 (Ind. App. 2000)

James v. Pike County, Ind., 759 N.E.2d 1140 (Ind. App. 2001)

Neither of these cases was decided by the Indiana Supreme Court, nor are they relevant as comparisons to the Missouri statute. The Indiana statute, unlike Missouri's, does not specify that 15 of 22 months in foster care is a ground for termination. *See* Ind. Code 31-35-2-4 (1998); RSMo 211.447.2(1), 211.447.3, and 211.447.5. The Phelps court even refers to the time frame as a "benchmark" and not a ground for termination. *Id.* at 818. The Indiana court also assumed that biological parents had appeared at a number of hearings on the issue prior to the filing of a petition to terminate parental rights. *Id.* at 818. In the case at bar, a petition to terminate parental rights was filed before a hearing was ever held in the trial court. (LF 1, 208).

2. Nebraska:

In re Ty M., 655 N.W.2d 672 (Neb. 2003)

In re Sunshine A., 602 N.W.2d 452 (Neb. 1999)

The Nebraska statute at issue in these cases bears an overall resemblance to RSMo 211.447 in its termination requirements; i.e., both demand clear and convincing evidence that the 15 of 22 month time frame is

met *and* that termination is in the best interests of the child. *See* Neb. Rev. Stat. 43-292 (1998). The court in Ty M. viewed the period of foster care as a rehabilitation period and not an absolute ground for termination. *Id.* at 176. The Nebraska court did not provide an in-depth constitutional analysis, since that appellant's pleadings were generally broad. *Id.* at 174.

This Court has not analyzed RSMo 211.447 on constitutional questions; however, the clear indication that Missouri considers 15 of 22 months in foster care as a stand alone ground for termination should inspire this Court to find it arbitrary, capricious, and constitutionally infirm in spite of Nebraska's ruling. A supplemental finding of best interests cannot cure a constitutionally defective ground for termination of parental rights, since best interests cannot be addressed without first finding a lawful basis for terminating.

3. Oklahoma:

In re M.C., 993 P.2d 137 (Okla. Civ. App. 1999)

In re T.M., 6 P.3d 1087 (Okla. Civ. App. 2000)

In re M.J., 8 P.3d 936 (Okla. Civ. App. 2000)

In re C.R.T., 66 P.3d 1004 (Okla. Civ. App. 2003)

The Oklahoma Supreme Court has not ruled on the constitutionality of that state's termination statute.

The C.R.T. court found that "In the context of extended foster care, the evidence must also show that the parent bears the culpable responsibility for the fact that the child has been in foster care for the requisite period and that the parent is not the subject of an uncorrected condition which is by its nature beyond the parent's power to correct." *Id.* at 1012. The same court emphasized the importance of constitutional and procedural protections in termination proceedings based upon this ground. *Id.*

In the case at bar, procedural due process was nonexistent for the appellant. (App. Br. Point 2). The state, by violating appellant's procedural due process rights, created the conditions which satisfied the 15 of 22 month ground *before the first hearing was ever held in the trial court.* (LF 1).

The C.R.T. court discussed the necessity of allowing for examination of the conditions causing the child to meet the 15 of 22 month time frame, acknowledging that failure to inquire could lead to absurd results (as in the case at bar), and that termination based upon extended foster care could not pass constitutional muster. *Id.* at 1012.

For these reasons, termination of the appellant's parental rights based upon RSMo 211.447.2(1) violates due process, and that portion of the statute should be declared unconstitutional by this Court.

Point 2 – Procedural Due Process Violations by the Parties

Appellant argues that the procedural due process violations by the trial court and parties led to manifest injustice sufficient to reverse the termination of her parental rights. Respondent's brief addresses only a few of those violations.

1. Removal of children from the home.

Respondent suggests that suspicion of neglect justifies removal of the children without a court order, without making reasonable efforts to prevent removal, and without the existence of emergency conditions. (Resp. Br. 54). Respondent provides no on-point authority for that position. Reasonable suspicion of neglect gives rise to a court order for removal; however, in the case at bar, removal gave rise to a court order. (Mother's a at 29; LF 13).

The respondent suggests that a suspicion of neglect is the equivalent of an emergency situation, allowing the sudden removal of the children from the home, relieving DFS of making reasonable efforts to prevent removal, and somehow justifying the trial court's failure to make the findings required by RSMo 211.183.3. The social worker testified that the family's original trailer had ". . . holes in the floor. Things were just crammed everywhere. There was just a walk space. I'm not even sure where the children slept." In

spite of these conditions, the worker testified that she left the children in the home "[B]ecause there was no imminent danger at this time." (TR 198). Yet the children were removed months later from a newer mobile home without warning because of chronic head lice, dirty dishes, piles of dirty clothes, etc. (LF 11-14).

The respondent attempts to distract the Court by referring to the Father's rare appearances at the family's home. The appellant reminds the Court that these "sightings" occurred after the children were removed from the home when no protective order was in place, no allegations of abuse had been raised with regards to the children who are subjects of this appeal, and the father owned the property upon which he was seen. There was no legal basis for keeping Father away, even if he was a danger to the children. In fact, the only child who raised allegations of abuse was returned to the family's home less than 24 hours after being taken, indicating the court's lack of true concern about abuse or neglect in the home. (LF 15).

2. Temporary Transfer of Custody.

The respondent improperly introduces evidence for the first time on appeal by referring to the Temporary Transfer of Custody. (LF 16, Resp. Br. 56). This evidence was not introduced at trial and was not subject to cross-,

examination, or even to direct examination. Introducing evidence for the first time on appeal is a denial of appellant's fundamental right to cross-examination and plain error for this Court to consider this evidence now. State v. Cottrill, 855 S.W.2d 379 (Mo.App. W.D. 1993).

Had appellant had the opportunity to address this evidence at trial, she would have testified that she was told her signature gave consent for medical treatment of the children while in state custody, that she did not know the meaning of "waiver of service" and that she did not know the meaning of "entry of appearance." Persons of average intelligence do not know the meaning of these terms unless familiar with the law. Appellant's IQ test showed her functioning at the "borderline range of intellectual functioning. . . . between low average and mentally retarded." (TR 390). This cannot be construed as informed consent to transfer of custody.

Even if appellant's signature on the document is considered as validly admitted evidence in this Court, it does not relieve the trial court or the parties from protecting the appellant's procedural due process rights by complying with Supreme Court Rules and the Revised Statutes of Missouri as set forth in Point 2 of Appellant's Brief.

3. Statutory Time Lines

Respondent relies on In re D.K.S., 106 S.W.3d 616 (Mo.App. W.D. 2003) for the proposition that "shall" in the Supreme Court Rules and Revised Statutes of Missouri does not mean "shall." The D.K.S. court relied on this Court's decision in Farmers and Merchants Bank v. Director of Revenue, 896 S.W.2d 30 (Mo.banc 1995). In Farmers, this Court declared that when a statute sets a deadline without providing for a consequence for not meeting the deadline, use of "shall" should be directory and not mandatory. *Id*. at 618. Farmers was a tax case and did not deal with fundamental rights. The D.K.S. court used this ruling to find that non-compliance with statutory timelines did not divest the court of jurisdiction. *Id*. at 619. D.K.S. is not a termination of parental rights case.

The court reversed a termination of parental rights for non-compliance with the statutes. In the Interest of K.L.S., ED 81837 (Mo.App. E.D. 2003). "Termination of the parent-child relationship must be tempered and controlled by strict and literal compliance with the statutes." *Id*.

The respondent seeks to place responsibility for the trial court's and DFS's compliance with timeline requirements squarely upon the appellant, who is poorly educated with low IQ and who was not represented by counsel. (Resp. Br. 58). The respondent suggests that appellant's remedy

was mandamus; however, he fails to explain how a person uneducated in the law with low IQ and without benefit of counsel should be aware that mandamus even exists.

Because the lower courts differ as to whether these timelines are mandatory or directory, this Court must clarify the issue. The appellant urges the Court to hold the lower courts to the plain language of the statutes, the Code of State Regulations, this Court's Rules, and ASFA, finding that when fundamental rights are involved, "shall" means "shall."

4. Religious Matching Placement

The respondent erroneously suggests that RSMo 211.221 has no applicability to this case. (Resp. Br. 60A). After removal, the children were immediately placed in a foster home of a substantially different religion, yet the court was told by DFS that the children were in a home of the same religion as the biological parents. No efforts were made to place the children in a home of the same religion as that of the appellant. The children were then moved to the adoptive parent's home where the religion was also substantially different from the appellant's. This issue is very relevant to this case as the adoptive parents' case was consolidated with the juvenile case and the appellant's claim for violation of religious freedom continues.

5. Actual Notice of the Adoption Proceeding

The respondent misstates the evidence. (Resp. Br. 60A). The foster parents filed their petition for termination of parental rights and adoption on July 31, 2001 without giving the appellant notice of her right to counsel. (LF 217). This occurred nearly two years after the children were taken from the appellant, but before any hearing was held on the allegations of abuse or neglect. (LF 1, 208). The state did not file its petition for termination of parental rights until January 31, 2002. (LF 2). Court-appointed counsel accepted service on this petition.

The respondent's reference to the summons on Page 41 of the Legal File is wrong. (Resp. Br. 60). Legal File Page 41 is the written notice to the appellant of the first hearing in the juvenile case and of her right to counsel, and is dated August 30, 2001. It was this notice that prompted her to request court-appointed counsel two years after her children were taken from her.

Appellant does not suggest reversing the termination of parental rights on this basis, nor does she insist on "extreme and empty formalism" as the respondent asserts in his brief. (Resp. Br. 61). Appellant merely points to this issue as yet another in a long series of procedural and statutory violations that deprive her of due process throughout the proceedings.

In conclusion, the respondent simply cannot justify the numerous due process violations that are set forth in Point 2 of the appellant's brief. Because of those due process violations, this Court should reverse the termination of parental rights and protect the appellant's constitutional due process guarantees.

Point 3 – The term "emergency" is void for vagueness in RSMo 211.183

The respondent cites In re Hill, 8 S.W.3d 578 (Mo.banc 2000) and Doe v. Missouri Dept. of Social Services, 71 S.W.3d 648 (Mo.App. E.D. 2002) as standing for the proposition that the term "emergency" in RSMo 211.183 provides adequate notice of conduct which will result in the removal of children from their homes without reasonable efforts being made to prevent that removal. (Resp. Br. 63). Neither case is relevant. Neither involves a situation where a fundamental right is at stake.

The respondent is correct in stating that the word "emergency" and the statute containing it does not set forth any proscribed conduct. (Resp. Br. 63). This is precisely the reason the statute is void for vagueness and leads to arbitrary and discriminatory enforcement by state workers. Without definition, state workers remove children from their homes for reasons that vary from worker to worker. In this case, one social worker even held

Differing definitions of emergency that varied from moment to moment. She did not remove children from the family's old mobile home when it had holes in the floor, things crammed everywhere, and no obvious location for the children to sleep because there was no "imminent danger." (TR 198). Months later, the same social worker removed the children from a newer mobile home because of chronic head lice, dirty dishes, piles of dirty clothes, etc. (LF 11).

The respondent suggests that the "neglect" statute (RSMo 211.031.1(1)(a)) provides adequate notice of proscribed conduct in RSMo 211.183.1. (Resp. Br. 64). Neglect does not equate to the concept of "emergency." The respondent fails to acknowledge that under allegations of neglect, reasonable efforts are required to prevent removal of children from their homes. Only in an emergency may DFS forego making reasonable efforts. Removing children in a non-emergency without making reasonable efforts to prevent removal is an impermissible interference with fundamental rights.

Interpreting RSMo 211.183.1 as the respondent does allows the state to remove children under any suspicion of neglect without making reasonable efforts to prevent removal – a direct violation of ASFA. Removal of children cannot be based upon ephemeral definitions of

"emergency." Contrary to the respondent's assertions, the "neglect" statute does not provide notice of conditions constituting an "emergency."

The term "emergency" in RSMo 211.183.1 is constitutionally infirm and void for vagueness. The Court should find it unconstitutional.

Point 4 – Insufficient Evidence for Termination of Parental Rights

1. Abandonment.

The respondent correctly states that abandonment is an issue of parental intent. (Resp. Br. 69). Appellant testified that she never intended to abandon the children. (TR 770). Her continuing efforts to comply with the myriad of DFS requirements, to see her children, and to communicate with them evidences a clear intent to remain a devoted parent. (TR 770-773, Mother's Exhibit T, Mother's A at 245, 339, 342, 347-350).

2. Failure to pay support.

The respondent suggests that the appellant did not have good cause for not paying child support to the state. (Resp. Br. 70). The appellant was unemployed after October, 2000. (TR 713). DFS told the appellant no support was required. (Mother's A at 64). She had significant health problems that prevented employment and resulted in hospitalization. (TR

759). The appellant made one payment upon receipt of her first temporary disability check in February, 2002. The state entered a support order one year after her last date of employment. The respondent misstates the evidence in asserting that the appellant did not provide supplies in lieu of child support. (Resp. Br. 71, TR 121). No intent to abandon the children can be legitimately be inferred from non-payment of child support in this case.

3. Failure to exercise visitation.

The respondent suggests that the appellant refused to exercise visitation with her children. (Resp. Br. 71). The DFS worker refused to allow visitation until the appellant came to her office, nearly 20 miles from the appellant's home. (Resp. Br. 71, 73; Mother's A at 137). A meeting in the DFS office should not be a prerequisite to visitation, especially when the appellant had unreliable transportation and insufficient funds for gasoline. The appellant attended DFS meetings and visitation could have been arranged at that time. (Mother's A at 65, 88, 96, 125, 144, 175, 216). The appellant was reprimanded for even being in proximity of the children when she attended the foster family's church on one occasion. (Mother's A at

227). No court order was ever obtained ceasing visitation. (Mother's A at 178).

The respondent misstates the testimony, suggesting that the appellant missed visits frequently. (Resp. Br. 72). The testimony shows that the children frequently missed visitation, and the appellant missed rarely. (TR 117).

The respondent misstates the evidence when he states that the visits with the children ceased because of the children's physical symptoms. (Resp. Br. 72). The testimony shows that visits ceased because the therapist moved her office out of state. (TR 106). The respondent has no basis for suggesting that the appellant acquiesced to ending visitation in March, 2001. (Resp. Br. 72). The respondent further misstates the facts regarding legal proceedings and efforts for visitation. (Resp. Br. 72, 73). The original petition for termination was filed July 31, 2001 by the foster parents. (LF 208). Counsel was appointed on September 7, 2001. (LF 1). Counsel filed her motion for visitation on January 25, 2002. (LF 2). The state filed its petition for termination on January 31, 2002. (LF 2).

The respondent seeks to excuse DFS's failure to comply with the requirement for written visitation policies in 13 CSR 40-73.075(4). (Resp.

Br. 73). DFS must follow the agency's rules by providing visitation policies.

Intent to abandon the children by failure to visit cannot be legitimately found under the facts of this case because DFS refused to allow any contact between mother and child after February, 2001.

4. Abuse/Neglect.

The respondent alleges that the appellant's uninformed consent to Temporary Transfer of Custody provides consent to jurisdiction over the children and the appellant, AND to an adjudication of neglect. (Resp. Br. 75). This document was not presented at trial. (See discussion under Point 2, Section 2 above). Even if the Court finds consideration of this evidence appropriate, consent to jurisdiction certainly does not equate to admission of the allegations of abuse or neglect. Allegations must be proven, and no court ever adjudicated those issues until the termination of parental rights hearing.

Contrary to respondent's allegations, appellant provided both emergency and follow-up care for P.L.O.'s eye injury. (Resp. Br. 77, Mother's A at 395, 396; TR 740-744). The physician's statement that the child was "very difficult to examine" comports with appellant's testimony

that the child was kicking and screaming. (Mother's A at 395, 396). The respondent relies on discrepancies in dates to assert that appellant neglected immediate treatment for the eye injury. (Resp. Br. 77-79). The child had only one eye injury that was appropriately treated if not properly diagnosed. (TR 815, 832, 833).

Respondent misstates the evidence when he alleges the appellant had not gotten the children's immunizations. (Resp. Br. 79). Appellant provided shots prior to them being taken from her custody. (Mother's A at 410, 427).

Respondent misstates the evidence regarding the condition of the trailer at the time the children were taken. (Resp. Br. 82). The trailer home was not falling down, and no evidence supports this statement.

Respondent misstates the evidence regarding the social worker helping the appellant get a new trailer. (Resp. Br. 82). The social worker minimally assisted in trying to locate someone to move the appellant's new trailer to her property, but appellant made the arrangements herself. (Mother's A at 43, 54).

Respondent misstates the evidence regarding the bulldozer cleaning the appellant's yard. (Resp. Br. 82). A neighbor bulldozed the family's old trailer when the fire department failed to use it for a practice burn. (TR 725).

Respondent implies that the appellant was always home when DFS made unannounced visits but that she refused to answer the door. (Resp. Br. 82). No evidence was presented at trial that appellant was at the home when DFS made these visits.

Respondent asserts that the appellant's home was unlivable at the time of trial. (Resp. Br. 83). Other than not having electricity on that date, no evidence was presented to support this contention. The social worker reported conditions were substantially improved in September, 2001. (Mother's A at 143).

5. Failure to rectify.

The respondent misstates the evidence regarding the allegations against the children's father. (Resp. Br. 85). DFS did not substantiate sexual abuse in the home. (Mother's A at 428). Father was never charged with abuse. The allegations did not involve the children in this appeal.

Respondent misstates the psychologist's finding that the appellant's intelligence was low average. (Resp. Br. 87). Her IQ is 77, between low average and mentally retarded. (TR 390).

The psychologist took the appellant's statement regarding "unfatherly touching" out of context and did not inquire further as to its meaning.

(Resp. Br. 87; TR 395, 424, 425, 800, 819-822). This same psychologist would not recommend termination of parental rights. (TR 426). He noted that she did "real well" on parenting assessments. (TR 394).

6. Failure to cooperate and participate in social service plans.

Respondent misstates the evidence. (Resp. Br. 88). Appellant attempted to obtain a psychological evaluation. (Mother's A at 99). She was not required to attend Alcoholics Anonymous. She attended Al-Anon and provided documentation. (TR 802). She was not "emphatic" about not going to work, and testified that she continued to look for jobs. (Resp. Br. 91). Full compliance with DFS service agreements is not required for reunification, especially when, as in this case, there is no court involvement or determination as to the reasonableness of those requirements.

7. Reasonable efforts for reunification.

Appellant argues that ceasing reasonable efforts without court order violates state and federal law. (App. Br. Point 2). Respondent suggests that appellant's argument is "patently false," yet respondent does not provide evidence that the trial court ever ruled that DFS was permitted to cease reasonable efforts to reunite the family. (Resp. Br. 93).

Respondent misconstrues the appellant's position on this issue, ignoring the requirement that the *court* is required to determine when reasonable efforts are to cease, not DFS.

8. Termination and best interests.

Respondent's citations to the transcript do not support the position stated in this section of the brief. (Resp. Br. 94-96).

Findings for "best interests" are fact-specific. Appellant refers the Court to Point 1 of this brief for the discussion regarding whether the court may find best interests when the ground for termination itself is unconstitutional. "Best interests" should take into consideration all aspects of the case before the court. When the state marshals its resources against a parent, continually violates federal and state law and due process protections, creates the conditions leading to satisfaction of grounds for termination, and then seeks to terminate that parent's rights, it is against the logic of the circumstances and so unreasonable as to shock the sense of justice to find that it is in the child's best interests to permanently sever parental ties.

It is against the weight of the evidence to terminate appellant's parental rights. For this reason, the judgment should be reversed.

Conclusion

For the reasons stated herein and in the appellant's brief, the judgment terminating the appellant's parental rights should be reversed. Sections 211.447.2(1) and 211.183.1 of the Revised Statutes of Missouri should be declared unconstitutional.

Special Briefing Issue – Costs in Advance on Appeal for Indigent Persons

(Mr. Justin Harris authors this portion of the appellant's reply brief.)

The Attorney General's response on the advancement of costs issue misses the point. Appellant's right to appeal is, by Court rule, conditioned on the payment of the costs of preparing the record on appeal and supplying briefs. The Attorney General agrees the courts have the discretion to require the Division of Family Services to pay these costs. The issue here is whether the courts can require an advance payment of costs.

Appellant's brief demonstrates, as this Court knows, that copies of the record are necessary in order to secure appellate review and that the State is exercising a terrible power when it decided to terminate appellant's parental rights. When such a fundamental right is being deprived by the State, the State has an obligation to remove financial barriers that would prevent an indigent person from obtaining appellate review. Without advancement of costs, the State is effectively forcing appellant's court-appointed counsel to finance a lengthy and expensive appeal process.

The Division of Family Services has opposed every motion filed by the appellant seeking advancement of costs, knowing that appellant's counsel, a sole practitioner, would not be able to afford to finance this appeal. The Division of Family Services will pay these costs eventually – it merely seeks to create hardship and difficulty in exercising the right to appeal, in furtherance of its intention to exercise its prerogative to terminate appellant's parental rights. Ruling that a court does not have the discretion to advance costs would deter many smaller firm attorneys from representing indigent persons. Few practitioners would be able, even if willing, to advance several thousand dollars for the duration of an appeal.

Determining finally that courts have the discretion to order the Division of Family Services to advance funds to counsel for indigents for purposes of preparing the record on appeal supports the public policy of protecting the rights of the poor and oppressed when a fundamental right is at stake. The agency is best prepared to cover these costs, it anticipates paying the costs, and whether those costs are paid prior to trial or appeal, or afterwards, the ultimate expense for the agency is the same.

Rule 84.06 Certification

The undersigned hereby certifies that this brief:

1. Complies with the limitations contained in Rule 84.06(b);

2. Contains words;

3. The disk submitted with this brief has been scanned for viruses and is virus free.

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Certificate of Service

The undersigned hereby certifies that two true and correct copies of the appellant's brief were hand delivered or sent by U.S. Mail, postage prepaid, to each of the following attorneys of record on the _____ day of November, 2003.

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